No. _____

In The
Supreme Court of the United States

IN RE: LARRY FELDMAN,

Movant,

Supreme Court, U.S.
FILED
01-88 JUL 16 2001

LARRY FELDMAN,

Defendant/Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff/Respondent.

Petition for an Original Writ of Habeas Corpus to the United States District Court for the Southern District of Alabama (District Cout Case Number 89-00072-023)

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

Larry Feldman
Petitioner *pro se*
Reg. No. 41228-004
FCI Morgantown
Post Office Box 1000
Morgantown, WV 26507

32 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT WRIT OF CERTIORARI AND REVIEW THIS APPLICATION FOR WRIT OF HABEAS CORPUS BECAUSE *APPRENDI V. NEW JERSEY* IS A WATERSHED CASE WHICH MUST BE APPLIED RETROACTIVELY.

RULE 14(a)

LIST OF ALL PARTIES TO THE PROCEEDINGS

Larry Feldman

United States of America

RULE 14(b)

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RULE 14(c)

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

On Mar 12, 2001, the Eleventh Circuit Court of Appeals filed an Order denying the petitioner's request to file a second or successive motion under Title 28 Section 2255. That Order is attached in its entirety in the appendix.

RULE 14(d)

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to hear this direct petition for habeas corpus under Title 28 United States Code Sections 2241 and 2242.

RULE 14(e)

REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT OF THE DISTRICT IN WHICH THE APPLICANT IS HELD

In the interest of judicial economy, Mr. Feldman has declined to file a petition for habeas corpus in the district in which he is confined. That district has already denied a petition in a case with similar facts and has ruled that until this Supreme Court decides the issues presented herein, it will not rule favorably on such issues. (See Appendix - *Manglitz v. Bledsoe*)

It is apparent that without a decision by this Court on the issue of retroactivity in the case of *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) in particular or the issue of the retroactivity of a presumably "watershed case" in general, or the decision by this Court of a lower court's authority to hold that a case is retroactive neither the appellate court nor the district court where Mr. Feldman is confined will entertain his argument on the merits.

The Eleventh Circuit Court of Appeals has denied an application to file a second or successive motion under Title 28 USC Section 2255.

RULE 20(4)(a)

CONSTITUTIONAL PROVISIONS

AMENDMENT V

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHER INFAMOUS CRIME UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE, IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

AMENDMENT VI

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICTS SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

STATEMENT OF THE CASE

A. Procedural History

Larry Feldman, a/k/a Larry Arnold Givner, was charged in a Superseding 18 Count Indictment which was returned by a Federal grand jury in the southern District of Alabama in June 1989. Mr. Feldman was named in Counts Three, Four, Eleven and Sixteen of the Indictment.

On November 17, 1989, Mr. Feldman was found guilty by a jury verdict as to Count Four. Count Four charged the defendant and others with a violation of Title 21 U.S.C. Section 846, a conspiracy to distribute cocaine or marijuana.

On February 1, 1990, Mr. Feldman was sentenced to a term of imprisonment of 235 months. A Notice of Appeal was timely filed.

On July 5, 1991, the Eleventh Circuit Court of Appeals affirmed the conviction and sentence.

Mr. Feldman filed a Motion to Vacate, Set Aside or Correct a Criminal Sentence pursuant to Title 28 U.S.C. 2255 which was denied on April 3, 1996. On February 14, 2001, Mr. Feldman filed an Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence with the Eleventh Circuit Court of Appeals. That application was denied on March 12, 2001.

B. Relevant Factual Background

According to the government version of the case in the Presentence Investigation Report, Mr. Feldman was a member of a conspiracy which was allegedly responsible for the imporation of distribution of approximately 13,200 kilograms of cocaine during a period from 1981 to 1989 and 1,000 kilograms of marijuana.

Mr. Feldman was ultimately held accountable for amounts of cocaine in excess of 1,200 kilograms. He

was also given a two level adjustment for obstruction of justice for a total offense level of 38.

This amount was based solely upon the government version of events. Mr. Feldman always challenged the drug type and the amount attributed to him based upon relevant conduct and USSG Section 1B1.3. He was not given an evidentiary hearing as required by USSG Section 6A1.3.

Over time, the relevant conduct section of the guidelines was amended a number of times (Amendments 439 and 500) clarifying that section to the advantage of Mr. Feldman. Nevertheless, despite defense challenges, Mr. Feldman was still held accountable for a quantity of cocaine in excess of 1,200 kilograms without the jury having a role in this determination and without the jury specifying whether the offense they were finding guilt for was cocaine or marijuana.

Mr. Feldman was found not guilty of any substantive or overt drug act.

Mr. Feldman is currently incarcerated at the Federal Correctional Institution in Morgantown, West Virginia

REASON FOR GRANTING WRIT OF HABEAS CORPUS

WHETHER THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT WRIT OF CERTIORARI AND REVIEW THIS APPLICATION FOR WRIT OF HABEAS CORPUS BECAUSE *APPRENDI V. NEW JERSEY* IS A WATERSHED CASE WHICH MUST BE APPLIED RETROACTIVELY.

(a) Legal Basis for Claim

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Supreme Court, "for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge." *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2360 (2000).

Previously, while upholding a Pennsylvania statute that permitted a sentencing judge to impose a mandatory minimum term of incarceration for an uncharged firearm possession if the judge found, by a preponderance of evidence, that the offender visibly possessed a firearm during the commission of certain specified felonies, the Court set limits. First, the Court noted that constitutional limits do exist to States' authority to define any facts necessary to constitute a criminal offense. *McMillan, supra*, 85-88. Second, the Court stated that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment." *id.* at 88, may raise serious constitutional concerns.

In *Jones v. United States*, 526 U.S. 227 (1999), the Court made plain that former pronouncements such as in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which permitted sentence increase on "sentencing factors" not presented to the jury, represented an exceptional departure from historic practice. In *Almendarez-Torres*, the Court explained that "recidivism... is a traditional, if not the most traditional,

basis for a sentencing court's increasing an offender's sentence." *Id.* at 230.

Nevertheless, the Court in *Jones* noted that:

> under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones, supra at 243 n.6.

In *Apprendi*, the Supreme Court took the next step and held that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi, supra* at 2362. The Court determined that due process and other jury protections are not merely concerned with a defendant's guilt or innocence but they also extend to the length of his or her sentence. *Id.* at 2359.

In a recent decision the Ninth Circuit Court of Appeals undertook a discussion of a case involving a marijuana conspiracy charge. The defendant in that case, *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), had been charged, convicted and sentenced under Title 21 USC Sections 841(a)(1) and 846. The sentencing court found by a preponderance of evidence that Nordby was responsible for 1000 or more marijuana plants; a jury "never determined beyond a reasonable doubt the quantity of drugs for which he was responsible." *Id.* at 1056.

Stated the Ninth Circuit:

> [T]he only sentence under Section 841 justifiable under the facts as found by the jury would be a sentence (and possible fine) of not more than five years applicable to possession of less than 50 marijuana plants. See 21 USC Section 841(b)(1)(D).

Id. at 1059.

In other words, states the Ninth Circuit, "under *Apprendi* the 'prescribed statutory maximum' for a single conviction under Section 841 for an undetermined amount of marijuana is five years." *Id.*

(b) The Retroactivity of the Apprendi Decision

In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court narrowed the relief available to a habeas petitioner by limiting that petitioner to those rules of constitutional law in effect when a writ of certiorari is denied on direct appeal of the conviction. However, the Court in *Teague* left open two exceptions to the general proscription:

> Under Teague, new rules may be applied in habeas corpus proceedings only if they come within "one of two narrow exceptions." [*Saffle v. Parks*, 494 U.S. 484 (1990)]. The first of these applies to new rules that place an entire category of primary conduct beyond the reach of criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense... The second Teague exception applies to new "watershed rules of criminal procedure" that are necessary to the fundamental fairness of the criminal proceeding. Saffle, supra at 495; Teague, supra at 311-313.

Sawyer v. Smith, 497 U.S. 227, 241 (1990).

Teague's second exception, according to the Court in *Sawyer*, must implicate accuracy and alter "our understanding of the bedrock procedural elements essential to the [fundamental] fairness of a proceeding." *Id.* at 242. The Court would later explain that denying the right to a jury verdict beyond a reasonable doubt is a structural defect because, such an error takes away a "'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

Several circuit courts have applied the *Teague* exceptions to Supreme Court rulings. In *Nutter v. White*, 39 F.3d 1154 (11th Cir. 1994), the Eleventh Circuit explained that:

> [t]o fall within the exception, the new rule must satisfy a two-pronged test: (1) it must relate to the accuracy of the conviction; and (2) it must alter "our understanding of the 'bedrock procedural elements' essential to the [fundamental] fairness of a proceeding."

Nutter at 1157 (quoting *Sawyer*, 497 U.S. at 242).

In that decision, the *Nutter* Court examined the jury instruction rule from *Cage v. Louisiana*, 498 U.S. 39 (1990). In *Cage*, the Supreme Court found that a jury instruction which used the phrases "grave uncertainty", "substantial doubt" and "moral certainty" to define reasonable doubt, violated due process because it permitted the jury to convict on a lower standard of proof than beyond a reasonable doubt. *Id.* at 41.

The *Cage* rule, stated the circuit court, met the accuracy prong because the "reasonable doubt standard guards against conviction of the innocent by ensuring the *systemic* accuracy of the criminal system." *Nutter*at 1157.

Cage, the Eleventh Circuit held, also satisfied "the fundamental fairness prong of *Teague*'s second exception."

> The Supreme Court typically offers the right to counsel announced in *Gideon v. Wainwright*, 372 U.S. 355 (1963) as the paradigm of a "bedrock procedural element" falling within the second exception. Like *Gideon*, *Cage* implicates a fundamental guarantee of trial procedure because use of a lower standard of proof frustrates the jury-trial guarantee.

Nutter at 1157-58. *See also, Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994)(holding that a "rule that a constitutionally deficient reasonable doubt instruction violates the Due Process Clause satisfies *Teague*'s second exception.")

Apprendi, as did *Cage*, addressed an issue involving the reasonable doubt standard. The *Apprendi* Court held that it was the function of a jury to decide all elements of an offense beyond a reasonable doubt. As in *Cage*, *Apprendi* "implicates a fundamental guarantee of trial procedure because use of a lower standard of proof frustrates the jury-trial guarantee." *Nutter, id.* Indeed, the *Apprendi* Court has sought to guarantee essentially the same trial due process right as did the Court in *Cage*.

In *West v. Vaughn*, 204 F.3d 53 (3rd Cir. 2000), the Third Circuit held that the "made retroactive" language of the Section 2255 statute does not restrict second or successive motions under that statute to new rules of constitutional law which the Supreme Court has explicitly made retroactive:

> We conclude that precedent that makes clear that a new constitutional rule fits the *Teague* retroactivity exception suffices to make a rule retroactive for purposes of successive habeas petitions under AEDPA.

Id. at 61. *See also, Flowers v. Walter*, 239 F.3d 1096 (9th Cir. 2001)(Concurring with reasoning set forth in *West*)

Other circuit courts, however, have declined to extend retroactivity to *Apprendi* for purposes of the AEDPA and second or successive petitions under 2255. *See, In re Tatum* 2000WL 1707765 (5th Cir. Nov. 15, 2000); *Rodgers v. United States*, 229 F.3d 704 (8th Cir. 2000); *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000); *Hernandez v. United States*, 226 F.3d 839 (7th Cir. 2000); *In re Joshua*, 224 F.3d 1281 (11th Cir. 2000); *United States v. Sustache-Rivera*, 221 F.3d 8, 10-11 (1st Cir. 2000). These courts have taken the position that until the Supreme Court explicitly rules that the constitutional standard it announced in *Apprendi* is retroactively applicable on collateral review, they will not permit a second or successive petition under Section 2255.

(c) **Application to the Case Sub Judice**

As was the case with the defendant in *Nordby*, in the case at bar, Mr. Feldman was convicted of and sentenced for a violation of Title 21 USC Sections 841(a)(1) and 846. The jury never determined beyond a reasonable doubt the quantity or the type of drugs for which he was responsible. Mr. Feldman asserts that the *Apprendi* ruling, and the *Nordby* decision, demonstrate that his maximum sentence should have been five years rather than the almost twenty year term he actually received.

However, unlike the defendant in *Nordby*, Mr. Feldman is disadvantaged because the *Apprendi* decision was filed after his conviction became final and after he had already been denied in his inital motion under Section 2255. Nevertheless, had Mr. Feldman been convicted in the Third Circuit or Ninth Circuit, instead of the nearby Eleventh Circuit, he would, at this moment, undoubtedly be a free man. A trick of geography keeps him incarcerated.

Clearly, the denial of Mr. Feldman's petition to file a second or successive petition under Section 2255 was not occasioned by the Eleventh Circuit's view of the merits of the case but only by its consideration of the lack of retroactivity of the *Apprendi* ruling.

The Eleventh Circuit will obviously not take the merits of Mr. Feldman's argument under review until this Court decides to address the conflict among the circuits on the matter of retroactivity regarding the *Apprendi* case. Mr. Feldman was sentenced based upon information which was not in the Indictment and was not presented to a jury for their consideration. A jury "never determined beyond a reasonable doubt the quantity of drugs for which he was responsible." *Nordby* at 1056.

It should be noted that the statutory maximum sentence for Mr. Feldman should be five years because he was convicted of a drug conspiracy with mixed drugs without the benefit of special jury instructions. *See, Edwards v. United States*, 523 U.S. 511 (1998); *United*

States v. Dale, 178 F.3d 429 (6th Cir. 1999) and *United States v. Rhynes*, 206 F.3d 349 (4th Cir. 1999).

SUMMARY

Mr. Feldman was convicted of conspiracy to possess with intent to distribute marijuana and cocaine. He was sentenced to a term of 235 months. Under the rule first announced in *Jones*, and later solidified in *Apprendi*, the indictment was defective for not stating the quantity of drugs.

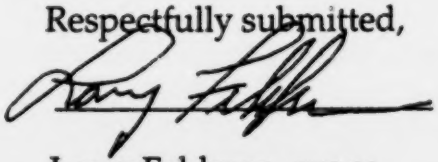
Apprendi is a watershed case and announced a new rule of constitutional law, to wit: under the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial Guarantees of the Sixth Amendment, any factor (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. This was not done in the instant case.

Since the announcement of *Apprendi*, the Supreme Court has reversed numerous sentences and remanded for resentencing in light of that new rule. The circuit courts have followed suit in numerous other cases.

However, there is a divergence of opinion among the circuits as to: (1) whether a circuit court has the ability to declare a Supreme court ruling retroactive on its own; and (2) whether a general retroactivity declaration applies for AEDPA purposes. The Third Circuit and the Ninth Circuit have answered these questions in the affirmative. Several other circuits have stated that they are waiting for the Supreme Court to address the issue of the retroactive effect of the *Apprendi* holding. Because there is such a split among the circuits, Mr. Feldman asks this Court to resolve the retroactivity question of *Apprendi* in particular or, in the alternative, the question of whether a circuit court may interpret retroactivity for AEDPA purposes in

general. For these reasons, Mr. Feldman asks that this Court grant this Petition for Writ of Certiorari.

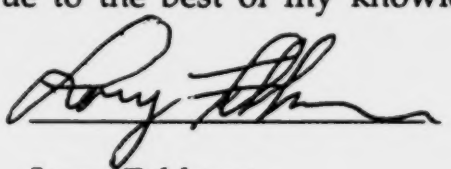
Respectfully submitted,



Larry Feldman, *pro se*
Reg. No. 41228-004
FCI Morgantown
P.O. Box 1000
Morgantown, WV 26507

VERIFICATION

Under penalty of perjury, I, Larry Feldman, petitioner herein, hereby state and declare that the aforementioned is true to the best of my knowledge and belief.



Larry Feldman

APPENDIX CONTENTS

1) COPY OF VERDICT FORM

2) 11TH CIRCUIT DENIAL OF APPLICATION TO FILE SECOND 2255

3) COPY OF RELEVANT JURY INSTRUCTIONS

4) ORDER OF DISTRICT CT DENYING PETITION IN SIMILAR MATTER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CRIMINAL
	)	NO. 89-
LARRY FELDMAN, a/k/a LANCE	)	00072-AH
FLEMING, a/k/a LARRY GIVNER	)	

VERDICT

WE, THE JURY, FIND THE DEFENDANT, LARRY FELDMAN, a/k/a LANCE FLEMING, a/k/a LARRY GIVNER:

____GUILTY __X__NOT GUILTY AS CHARGED IN COUNT 3 OF THE SUPERSEDING INDICTMENT.
__X__GUILTY ____NOT GUILTY AS CHARGED IN COUNT 4 OF THE SUPERSEDING INDICTMENT.
____GUILTY __X__NOT GUILTY AS CHARGED IN COUNT 16 OF THE SUPERSEDING INDICTMENT.

_____
FOREPERSON

Filed in Open Court
NOVEMBER _____, 1989
JOHN V. O'BRIEN, Clerk
By: _____
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 01-10854-B

IN RE: LARRY FELDMAN

Petitioner

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. Sections 2255, 2244(b)(3)(A)

Before: BIRCH, CARNES and BARKETT, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. Sections 2255 and 2244(b)(3)(A), as amended by sections 105 and 106 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Larry Feldman has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. Section 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense: or

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. Section 2255.

In his application, Feldman identifies one claim that he wishes to raise in a second or successive motion to vacate: he was unlawfully convicted and sentenced to 235 months' imprisonment because the jury did not make a determination regarding the type and quantity of drugs involved in his offense. Feldman alleges that his claim relies on a new rule of constitutional law, citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)(holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

To warrant the granting of his application, Feldman must demonstrate that Apprendi established a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. Section 2255. Feldman contends that Apprendi is retroactive because it is similar to the Supreme Court's decision in Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). Fedlman also asserts that, although the Supreme Court has not applied Apprendi retroactively to cases on collateral review, both the majority and dissenting opinions in Apprendi implied that it should be retroactive. Regardless of whether Apprendi established a "new rule of constitutional law." Or whether Apprendi applies to Feldman's conviction or sentence, the Supreme Court's holding in Apprendi has not been "made retroactive to cases on collateral review by the Supreme Court," as required by section 2255. In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000). Feldman requests in his application that this Court review its Joshua decision en banc. Feldman fails, however, to offer any valid reason why this Court should reconsider Joshua.

Feldman has failed to make a prima facie showing of the existence of either of the grounds set forth in 28 U.S.C. Section 2255. Accordingly, his application for leave to file a second or successive motion is denied.

JURY INSTRUCTIONS
(RELEVANT PAGES)

In this case the Indictment charges the defendant with three separate offenses called "counts". At the beginning of this case, I read those counts of the Indictment to you. I will not read it again at this time. You will have a copy of the Indictment with you while you deliberate, and you can refer to the exact language of the Indictment at that time. In summary, Count 3 charges that all defendants knowlingly and willfully conspired together to import cocaine and marijuana into the United States from a place outside the United States, the alleged conspiracy being a violation of 21 U.S.C. Section 963. Count 4 charges that all defendants knowingly and willfully conspired together to possess cocaine and marijuana with intent to distribute, the alleged conspiracy being a violation of 21 U.S.C. Section 846. Count 16 charges the commission of a so-called substantive offense, specifically, that the defendant and others knowingly and willfully attempted to import cocaine into the United States from a place outside the United States, in violation of 21 U.S.C. Sections 846, 2 and 952(a). I will explain the law governing these substantive offenses in a moment. First, however, as to counts 3 and 4, you will note that the defendants are not charged in those counts with violating any of the substantive acts alleged in those counts; rather they are charged with having conspired to do so in violation of 21 U.S.C. Section 963 and 21 U.S.C. Section 846.

Count Three

Count three charges the defendant and others with violation of Title 21, United States Code, Section 963, which makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of Section 952(a). Section 952(a) makes it a crime for anyone to knowingly import cocaine or marijuana into the United States.

So, under the law, a "conspiracy" is an agreement, or a kind of "partnership in criminal purposes", in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the government to prove that all of the people named in the Indictment were members of the scheme, or that those who were members had entered into any formal type of agreement ...

Count Four

Count four charges the defendant and others with violation of Title 21, United States Code, Section 846 which makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly distribute cocaine or marijuana or to possess cocaine or marijuana with intent to distribute it.

I have already charged you with regard to the law on conspiracy and on aiding and abetting and those instructions are equally applicable here.

Count Sixteen

Count 16 of the Indictment charges that the defendant and others attempted to import cocaine. Title 21, United States Code, Section 952(a), makes it a federal crime or offense for anyone to knowingly import any controlled substance into the United States.

Cocaine is a controlled substance within the meaning of the law...

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

PHILIP MANGLITZ,
Petitioner,

v.

CIVIL ACTION NO.
1:01CV11
(Judge Keeley)

BRIAN A. BLEDSOE, Warden,
Respondent.

ORDER DENYING PETITION

On January 29, 2001, petitioner filed an application for a writ of habeas corpus, pursuant to 28 U.S.C. Section 2241, seeking to have this Court reduce his sentence from nine years to five years, in light of the Supreme Court recent ruling in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) and the ninth circuit's decision in United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000). Petitioner has paid the $5.00 filing fee. However, because petitioner cannot use 28 U.S.C. Section 2241 to circumvent the requirements set forth in 28 U.S.C. Section 2255 for the filing of a second or successive Section 2255 motion, the petition is **DENIED WITH PREJUDICE.**

Petitioner was convicted by a jury in the United States District Court for the District of Maryland, at Baltimnore on June 26, 1996, of conspiracy to distribute Marijuana, conspiracy to launder money, money laundering and aiding and abetting.[1] He was later

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[1] While the Court takes the statements set forth by petitioner in his petition as true, it also has before it United States v. Manglitz, 141 F.3d 1161, 1998 WL 205806 (4th Cir. 1998)(affirming petitioner's conviction and sentence on direct review) and United States v. Manglitz, 229 F.3d 1145, 2000 WL 1227521 (4th Cir. 2000)(denying petitioner's Section

sentenced to a total of 108 months incarceration and is currently serving his sentence at FCI-Morgantown in the Northern District of West Virginia.

On direct appeal petitioner claimed that he should have been sentenced under the money laundering guidelines instead of under the drug conspiracy guidelines. The Fourth Circuit disagreed, noting that the Federal Sentencing Guidelines provide that the sentence for a conviction is derived from the most applicable offense to the conviction and that the sentencing court did not err in finding that petitioner's conviction for conspiracy to distribute marijuana, pursuant to 21 U.S.C. Section 846, was covered by Section 2D1.1 of the Guidelines. A petition for rehearing with suggestion for rehearing en banc was subsequently denied by the Fourth Circuit and the United States Supreme Court denied his petition for a writ of certiorari.

Petitioner subsequently filed a motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. Section 2255, with the sentencing court. His motion was denied and he appealed to the Fourth Circuit Court of Appeals. His appeal was denied in a summary per curiam opinion on August 30, 2000.

In the petition currently before this Court, petitioner asserts that his sentence was increased based on a "sentencing factor" (relevant drug weight) that was not presented to the jury, contrary to the Supreme Court's recent holdings in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999). Petitioner also relies upon a recent Ninth Circuit case which held that the prescribed statutory maximum for a single conviction under 21 U.S.C. Section 841, involving an undetermined amount of marijuana, is five years. United States v. Nordby, 225 F.3d 1053, 1059 (9th Cir. 2000).

However, Nordby involved a case on direct review and there is no question that the appellant was entitled

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2255 motion). The Court would note that petitioner's Section 2255 motion was denied post-Apprendi.

to the benefit of Apprendi's new rule even though the issue had not been raised before the district court. 225 F.3d at 1053. By contrast, petitioner now seeks a writ of habeas corpus against his custodian, the Warden of FCI-Morgantown, alleging that his confinement is illegal because his sentence was imposed in violation of Apprendi.

Apprendi indisputably sets forth a new constitutional rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-63. Furthermore, the text of the decision itself makes clear that the Supreme Court understands that it has set forth a new constitutional rule.

However, those circuit courts of appeals around the country to have considered the issue have concluded that Apprendi did not make the new rule retroactive to cases on collateral review. See e.g. Rodgers v. United States, 229 F.3d 704, 706 (8th Cir. 2000). (Apprendi is not available to a prisoner filing a second or successive petition under Section 2255); In re Billy Ray Tatum, 233 F.3d 857, 859 (5th Cir. 2000)(observing that neither Apprendi nor Jones involved collateral proceedings and the Supreme Court has not expressly stated that the holdings in these cases are to be applied retroactively to cases on collateral review); Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000)("Apprendi does not state that it applies retroactively to other cases on collateral review. No other decision of the Supreme court applies Apprendi retroactively to cases on collateral review,"); Garrott v. United States, -- F.3d --, 2001 WL 71075 (7th Cir. 2001)(concluding that no appellate court has held that Apprendi applies retroactively on collateral attack). See also In re Vial, 115 F.3d 1192, 1197 (4th Cir. 1997)(holding that for a new rule of constitutional law to be made retroactive to cases on collateral review, the Supreme Court must declare the collateral availability of the rule either explicitly by stating so directly or by applying the rule

in a collateral proceeding). To date the Supreme Court has not spoken as to whether the new constitutional rule set forth in Apprendi applies to cases on collateral review.

Although the Fourth Circuit Court of Appeals has yet to rule on the availability of Apprendi to cases on collateral review, Chief Judge Haden of the United States District Court for the Southern District of West Virginia recently issued a decision in a case analogous to the case before this Court. Young v. Conley, -- F.Supp.2d --, 2001 WL 52652 (S.D.W.VA. 2001).[2] Young, like petitioner, filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. Section 2241, on an Apprendi claim, in an attempt to circumvent the requirements for filing a second or successive Section 2255 motion.

Section 2255 requires that a second or successive motion be certified by a panel of the appropriate court of appeals as containing either newly discovered evidence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme court, that was previously unavailable." Section 2255. As discussed supra, the Supreme Court has yet to declare whether its new rule of constitutional law is retroactive to cases on collateral review.

An application for a writ of habeas corpus, such as petitioner seeks here, shall not be entertained if it appears that the applicant has failed to apply for releief to the sentencing court or that the sentencing court has denied relief, "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. Section 2255.

The Fourth Circuit has examined the prerequisites for finding that Section 2255 is an inadequate or ineffective remedy. In the case of In re: Byron Jones, 226 F.3d 328 (4th Cir. 2000), the court concluded that:

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[2] A copy of Chief Judge Haden's decision is attached. Although intended for publication, the decision was issued on January 25, 2001 so petitioner may be unable to find a copy of it in the Federal supplement Reporter.

> Section 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of the conviction, settled law of thos Circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first Section 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of Section 2255 because the new rule is not one of constitutional law.

Jones. 226 F.3d at 333-34. Because Apprendi is a constitutional rule, petitioner cannot satisfy the third prong of Jones. "As a constitutional rule, Apprendi-based challenges are explicitly subject to the gatekeeping provisions of Section 2255." Young, at *3.

Therefore, Apprendi challenges must be brought under Section 2255 and petitioners who have previously filed Section 2255 motions must wait until the supreme court decides whether the constitutional rule in Apprendi is retroactive for collateral attacks. See Talbott, 226 F.3d at 871 (noting that appellate courts will authorize successive collateral review petitions if the Supreme Court declares that Apprendi applies retroactively on collateral attack and that, until then, such applications are futile, but not fatal).

In conclusion, Section 2255 is the only vehicle available to petititioner for bringing his Apprendi challenge and, until the supreme Court declares otherwise, it is futile for petitioner to pursue this challenge either under Section 2241 or as a second or successive Section 2255 motion.

Accordingly, the petition for a writ of habeas of corpur is **DENIED** and this case is **DISMISSED** from the docket of this Court.

It is so **ORDERED.**

The Clerk is furthered directed to send a copy of this Order, with the attached case of Young v. Conley, to petitioner by certified mail.

DATED: February _____, 2001.

IRENE M. KEELEY
UNITED STATES DISTRICT
JUDGE